IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 62 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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JASHWANTSINH I VAGHELA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KJ SHETHNA for Appellant(s) : 1,
MS DS PANDIT, LD.APP for Respondent-State.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 01/05/2007

CAV JUDGMENT

1. The present appeal is preferred by the appellant-orig. accused (hereinafter referred to as 'the appellant') under Section 374 read with Section 386 of the Code of Criminal Procedure, 1973, challenging the legality and validity of the judgment and order of

conviction and sentence dated 30th December 1991, passed by the learned Special Judge, Ahmedabad City, in Special (ACB) Case No.25 of 1989, whereby at the end of trial, the appellant came to be convicted for the offence punishable under Sections 7 and 13(1)(d)(i), (ii) and (iii) read with Section 13(2) of the Prevention of Corruption Act, 1947 and was asked to undergo sentence of simple imprisonment for two years for each offence proved and also to pay a fine of Rs.1000/- for each offence; and in default to make payment of fine, he is directed to undergo simple imprisonment for three months. Of course, the learned trial Judge has held that the substantive sentence shall run concurrently.

2. Heard Shri K.J.Shethna, learned counsel for the appellant and Ms.D.S.Pandit, learned Additional Public Prosecutor, appearing on behalf of the respondent-State. Shri K.J.Shethna, learned counsel for the appellant and Ms.D.S.Pandit, learned Additional Public Prosecutor for the respondent-State, both have taken me through the oral as well as

documentary evidence led during the course of trial and have made detailed submissions. To appreciate the rival contentions, firstly it would be proper to state the brief facts of the case placed by the prosecution before the trial Court.

3. The brief facts leading to filing of the present appeal in nutshell are as under :

3.1 The present appellant at the time of offence i.e. in September, 1988 was serving as Junior Inspector of Weights & Measures Department of Government of Gujarat, Ahmedabad and was a public servant. The complainant was a businessman dealing in iron, cement and other materials at Naroda in the name and style of M/s.Raj Trading Company and for the business purpose, the complainant was keeping in maintaining weighing equipment at his business premises. The complainant under a statutory obligation to get a necessary instruction of the said weighing scale done under the supervision of the officer of the Weights and Measures Department. It is alleged that for

this work of verification of testing of the weighing scale there are licenced agents and they are doing the work of correcting / repairing the weighing scales and sold to get clearance from the officer of the Weights & Measures Department, so a business men may not have to spend their valuable time in getting the equipment verified from the officers under the Bombay Weights and Measures Act.

3.2 It is the say of the prosecution that the complainant was getting his work done through one of his authorized agent i.e. M/s.Mukesh Scale Repairing Works, Dariapur. It is the case of the prosecution that the time limit of the said inspection of the weighing scale was over in June, 1988 and, therefore, the Peon of the department had served a notice to the complainant in the month of July, 1988. The complainant was called upon to get the scale repaired and passed. The complainant, thereafter, had to got this weighing scale checked and approved. The appellant had gone for the purpose of inspection to the business premises of the complainant on 13th September

1988 and it was found that though intimated earlier, the complainant did not get passing of the weighing scale and had not communicated to the department for the scale being ready for approval. According to the prosecution case, the appellant ordered to freeze the weighing scale and the same was sealed and the complainant was asked that he was committed the offence of using the weighing scale without getting it passed as per the provisions of the Bombay Weights and Measures Act.

3.3 It is further the say of the prosecution that the complainant had informed the appellant that the scale had been given to M/s.Mukesh Scale Repairing Works for necessary repairs and there is no fault on the part of the complainant. The requests made by the complainant were not considered by the appellant. On the contrary, complainant was served with the memo and his signature was obtained. On account of freezing of the scale and as the seal was applied on the scale, the complainant was suffering day to day financial loss and, therefore, he decided to approach the

appellant and went to his house on 23rd September 1988. According to the prosecution that the complainant inquired from the appellant as to what was required to be done in the matter and upon such inquiry, he told the appellant that he had assured to see that the seal is removed. In term, the complainant was called upon to deposit the compounding fees. It is alleged that appellant had assured that he will take necessary steps to see that the case is wound-up within 2-3 months and that in future the complainant shall not to face any hardship or convenience. The complainant was assured also that the appellant now would visit his business premises on 26th September 1988 any time between 10.00 a.m. and 12.00 Noon. The complainant was also asked to make necessary arrangements for amount.

3.4 As per the say of the prosecution that the complainant was not inquired to make any payment to the appellant and was simultaneously apprehending some harassment to him and, therefore, he decided to approach ACB Office and he approached ACB Office on 25th September

1988 and filed the complaint i.e. FIR in the present case.

3.5 It is the of the prosecution case that on receipt of the complaint, ACB Police Inspector Shri Vyas called two panch witnesses and after following the procedure applying anthracene powder on muddamal currency note and its demonstration, arranged a trap. As per the arrangement made, he drew the panchnama and completed the first part of panchnama in the ACB Office and proceeded further to carry out the raid. It is the prosecution case that the complainant and panch witness No.1 went to the business premises of the complainant along with the members of the raiding party and in company of one Mr.Mukesh. It is alleged that there was talk between the appellant and the complainant and, thereupon the complainant was called and asked to make payment of Rs.1,000/-. In response to the same, the complainant tendered muddamal currency notes of Rs.1,000/-. However, he requested the appellant to reduce the said amount as demanded by him and the appellant, in turn, had willingly accepted some

less amount of Rs.100/- and accepted an amount of Rs.900/- as illegal gratification. It is alleged that the complainant, thereafter, gave the agreed signal and on receiving such signal, the members of the raiding party immediately rushed at the shop of the complainant and the appellant was apprehended on the spot. Thereafter, the Police Inspector Shri Vyas called upon panch No.1 to take out the amount and after completing the necessary formality of ascertaining the anthracene powder marks and ascertaining the details as to how the amount was demanded and the currency notes were passed from the complainant to the appellant. The complainant, panch No.1 and the said Mukesh were present there and the second part of the panchnama was drawn.

4. On completion of the investigation and obtaining necessary sanction, a charge-sheet came to be filed by the police against the present appellant in Special Court, Ahmedabad City, for the aforesaid charges. After recording of oral as well as documentary evidence, the learned trial Judge has recorded

the findings of conclusion and that very judgment and order of conviction and sentence is under challenge.

5. On 04.12.1990, vide Ex.6 a charge came to be framed against the appellant for the offences punishable under Section 7 to r/w. Section 13(1)(d)(i)(ii) and (iii) of the Prevention of Corruption Act, 1947. The appellant pleaded not guilty to the aforesaid charges and, therefore, the prosecution led the evidence to establish the case against the appellant.

6. The learned trial Judge, after examining the appellant under Section 313 of the Code of Criminal Procedure, 1973, heard both the sides and came to the aforeaid conclusion of guilt, against which the present appeal is directed.

7. Shri K.J.Shethna, learned counsel appearing for the appellant, has taken me through the impugned judgment under challenge in this appeal and shown the grounds for challenging as mentioned in para-13 of the memo of the appeal. While ascertaining legality and

validity of the judgment and order, which is under challenge. Shri Shethna has argued at length. The first submission of Shri Shethna is that there is no convincing evidence as to initial demand of Rs.1,000/- and it would not be, either legal or proper to rely on the evidence of the complainant, who is a trap witness and a highly interested witness. The complainant developed inimical feeling towards the appellant, because he had sealed his weighing scale was feeling and apprehending by prosecution and, therefore, he has deposed that appellant had demanded bribe amount of Rs.1,000/-, and such bald words of complainant should not be believed as gospel truth. It is submitted by Shri Shethna, learned counsel for the appellant that it is true that the version of the complainant has been accepted, but the Court tried to seek some corroboration from independent and reliable sources and in absence of such corroboration, the learned trial Judge ought not to have been accepted the evidence of the complainant on the point of initial demand of illegal gratification.

8. It is submitted by Shri Shethna that the complainant and panch No.1 have not supported the prosecution case and both have declared as hostile witnesses. He has also submitted that it is true that the evidence of hostile witnesses, if is reliable and useful to the prosecution, the certain part of the evidence of the hostile witnesses also can be considered and looked into by the Court, while evaluating the strength of the case of the prosecution. But here the complainant and panch No.1 both have posed themselves as very weak witnesses and nothing has been stated by the panch No.1 supporting the prosecution, in the cross-examination, cannot be treated as reliable and substantiate piece of evidence. On the contrary, the learned trial Judge ought to have observed that both these witnesses are self-contempt and they are not capable of carrying the prosecution case further. It is submitted that the said Mukesh, who was in the company of the complainant has not been examined with the reasons best known to the prosecution. It appears that the said Mukesh, who was the person, was engaged in repairing

and correcting the scale of the complainant and was an agent to get scale of the complainant approved / verified from the department of Weights and Measures. In the same way, when panch No.1 has not supported the case of the prosecution, the second panch ought to have examined to prove and add on the strength in the case of the prosecution qua in the second part of the panchnama drawn by trapping officer, so the effect of trapping, is of two important witnesses namely the said Mukesh and panch No.2, would be fatal. The learned trial Judge ignored the important and relevant aspects.

9. One another point advanced by Shri Shetha is that the allegations submitted to the department and mainly to the appellant were proved by witness–Mukesh. So the said Mukesh could have thrown light on the correct facts and when no independent witnesses have supported the case of the prosecution, the evidence of Investigating Officer Shri Vyas would not help the prosecution case. He has also submitted that Police Inspector Shri Vyas

has not acted in a transparent or fair manner and conduct of the Police Inspector Shri Vyas is found to be conduct of a person, who was interested in trapping the appellant any how, otherwise he would have to explain that why the complainant failed in complying the instruction, which was given to him at the time of treating first part of panchnama. It is submitted that there was no reason to the complainant to request the appellant to reduce the amount of bribe demanded by him. In the same way, he has not remained objective, while selecting the panchas. Shri Shethna has drawn attention to this Court to the evidence of Police Inspector Shri Vyas at Ex.19. He has submitted that in para-4 of the deposition of Police Inspector Shri Vyas, he admitted that on arrival of panch witnesses, he had realized that one of the person had been to ACB Office and had taken as panch witness in arranging the trap at village Vadad and that trap had failed. He has also accepted that he was serving in the very office from where the panchas were called, is his first cousin. That Shri Vyas is a store keeper in the office from

where panchas were called. Both the panchas were called from the office of the P.W.D. The second panch Mr.Patel was a Junior clerk and panch No.1 was also a clerk in the very office. In such a situation, the evidence of Shri Vyas ought not to have been accepted as reliable piece of evidence. On the contrary, one fact which came on record about the use of walky-talky set in arranging and processing the trap, Shri Vyas must not have been there near investigated and when the panch No.1 has not supported the case of the prosecution, the learned Judge ought not to have accepted the evidence of the recovery of currency note to panch from the appellant. He has also drawn the attention to this Court the document Ex.21, which is closing purshis. The effect of the closing purshis was that the prosecution was satisfied with the evidence led during the trial meaning thereby that they did not want to examine the final report submitted under the provision of the Cr.P.C. As such no formal trap has been given to the appellant in the present case, otherwise, the appellant might have objected such trap. It is true that it

was open for the appellant to examine panch No.1 and the said Mukesh as defence witnesses, but according to Shri Shethna non-examination of the important witnesses, who were competent to lead the evidence in the fact finding mission by the prosecution is nothing but absence of accepted fairness. When the appellant had not reduced the amount of originally demand in time prior to passing of the muddamal currency notes, otherwise, it would have reflected in the first part of panchnama then why the complainant attempted to negotiate with the appellant, is the question. This attempt nullifies the case of the prosecution qua initial demand and the initial demand is found not proved beyond doubt that second part of the panchnama would come under the thick shed of doubts. The explanation given by the appellant in his statement recorded under Section 313 of the Criminal Procedure Code would have considered in its correct perspective with emerges that the appellant have been falsely implicated. The basic case of the prosecution is that the demand of illegal gratification was made

through the said Mukesh, the Agent dealing in such matters. If the said Mukesh is not examined then the learned trial Judge ought to have said that there is no convincing evidence qua initial demand. If the deposition of the complainant is read, it is clear that the complainant has taken two sharp turns and that has made by complainant as self-condemned witness.

10. Shri Shethna has drawn the attention of the Court the certain contradictions in the deposition of the complainant Ex.10 (relevant page Nos.47 and 48). When the complainant has said that he had informed the said Mukesh about his intention to file complaint with ACB and the things delivered by the said Mukesh was considered by him for filing complaint, the learned trial Judge ought to have observed that in absence of evidence of the said Mukesh no weight should be given to the version of the complainant. It is in an evidence that the seal was removed on 29th September 1988 and he himself has paid Rs.2,000/- on 28th September 1988. The complainant was given four forms

i.e. chalan by the appellant on the very day. These chalans were used for paying the amount with the Government were given by Shri Waghela, when they were coming out of his office and proceedings towards the weighing scale. He has admitted in his deposition (para-12) that he has not stated before the police that “thereafter Shri Waghela was asked to accept the amount of Rs.1,000/- as agreed earlier.” He was also not stated that in the statement that he had also asked to release weighing scale immediately. In para-13 in his deposition, he has admitted that when he attempted to give the amount of Rs.900/- to appellant, he has refused to accept the same. The complainant in his deposition in para-13, has stated that “it is true that I tried to give Rs.900/- to Shri Waghela, but he had refused to accept the same. It is also true that therefore, I gave the amount to the said Mukesh”. The plain reading of the deposition of the complainant of para-13, it emerges that the bribe amount of Rs.900/- had given to the said Mukesh first through complainant and thereafter the said Mukesh had paid that

amount to appellant. Of course, the complainant has denied that the said Mukesh had forcibly place the bribe amount in the pocket of Shri Waghela, but there is no confusion on the point that the bribe money either had given and accepted or forcibly granted by the said Mukesh and by the complainant. This is the version of the complainant in his the cross-examination. So, integral story placed by the prosecution cannot be said to have been proved beyond doubt and, therefore, this Court should interfere with the findings recorded by the learned trial Judge and the appellant should be given benefit of doubt.

11. As against that Ms.D.S.Pandit, learned Additional Public Prosecutor, supporting the conclusion as to the conviction of the appellant by the trial Court, submitted that there is nothing in the evidence of the complainant to disbelieve him. According to the learned APP, the prosecution has established beyond reasonable doubt. The three facts which are very relevant; the demand of

bribe amount immediately prior to its acceptance from the complainant; the Court should look to the element of hidden demand in the background of the status of the appellant and the situation that has taken shape because of negligence on the part of the complainant in getting his weighing scale certified / approved to the conduct of the appellant immediately prior to the acceptance of the amount of bribe on the date of trap and his inconveniencing explanation qua the recovery of the muddamal currency notes from him; and the fact of passing of the amount from the complainant to the appellant and its acceptance under some understanding, because the appellant was not entitled to accept cash from the complainant. Learned APP drawn attention to this Court that the conversation that had taken place before handing over the muddamal currency notes to the appellant makes the prosecution case more trustworthy and the reduction of Rs.100/- in the bribe money demanded provides sufficient corroboration to the appellant of the prosecution qua the initial demand was made of Rs.1,000/- by

appellant. After evidence was over, the circumstances appearing against the appellant were brought to his notice and statement was recorded of the appellant under Section 313 of the Code of Criminal Procedure. In his further statement his stand about the prosecution evidence is of total denial. Learned APP has submitted that the appellant has admitted his presence at the place where he was trapped, but according to the said Mukesh, he had taken him to the office of the complainant and it was contended by him that as he was very strict and had filed two cases against the customers of M/s.Mukesh Scale Repairing Works. He i.e. the said Mukesh has implicated him falsely. Learned APP has submitted that the say of the appellant is that the superior officer was also not happy because of his strict approached and his union activities within the department prior to the incident, once he was in the District : Kheda and the Traders of District: Kheda had created problems against him only because he was strict and, therefore, he had sought police protection. According to Ms.D.S.Pandit, the

appellant attempted to pose himself as honest, bright and strict officer, but in view of the natural evidence led by the prosecution, such explanation should not be treated as reasonable or probable explanation which can be said to be sufficient for the purposes of rebuttal of the presumption raised under Section 20 of the Prevention of Corruption Act. Learned APP has submitted that this rebutting of presumption if is considered in the totality of the evidence the conduct of the appellant, the appeal must fail and the judgment and order of conviction and sentence should be upheld.

12. To appreciate the rival contentions and four decisions cited by Shri K.J.Shetha, the Court shall have to look to the nature and quality of the evidence led by the prosecution. The documents tendered in evidence have not been seriously assailed except the panchnama drawn by the trap officer. The trap panchnama has been assailed from all corners, as complainant including the recovery part and panch No.1 has not supported the case of the prosecution

substantively and material part of the panchnama has remained “not proved”. So this vital document or entire incriminating part of this document whether can be used to link the appellant with the alleged crime, is one of the main questions posed before the Court.

13. In an ACB Trap Case, the prosecution is supposed to establish the fact of demand and acceptance of the bribe amount, beyond reasonable doubt. In the present case, the prosecution has examined complainant- Rajubhai Aasandas Tirthani, P.W.1 at Ex.10, a business man dealing in steel, cement and welded material and, therefore, using the weighing scale, he was under statutory obligation to see weighting scales were maintained properly and scale requires and it gets approval of the officer of Weights and Measurements Department of the State of Gujarat. When he failed in getting his weighing scale corrected and approved, it was frozen and sealed by the appellant. It is not the say of the complainant that before freezing or sealing the scale, the demand of illegal gratification

was made by the appellant. On receipt of two memos from appellant, the complainant had called his agent M/s.Mukesh Scale Repairing Works. Shri Mukeshbhai of M/s.Mukesh Scale Repairing Works was called and the complainant had asked Mukeshbhai as to whether it required to go the residence of the appellant and, thereafter both of them had gone to the residence of the appellant on 23rd September 1988. According to the complainant, he had not personally talked with the appellant, but the said Mukesh had some conversation and after coming out of the house of the appellant, the said Mukesh informed the complainant that the appellant demands Rs.2,000/- as compounding fee and Rs.1,000/- over-and-above the amount of compounding fee. Thereupon, the appellant would give chalan for payment of Rs.2,000/- and at that time, Rs.1,000/- shall have to be paid as bribe on 26th September 1988 instead of 25th September 1988 because it was Sunday and on that day, complainant went to the office of ACB and on the arrival of the Inspector at ACB Office, he gave the complaint. At that time the said Mukesh was with him. However,

according to the complainant, the complaint has not been written as per his say and version and the things which were written in the complaint is in reference to the conversation which has taken place for bribe amount, but it was not written in the manner in which he was stated. In this background, the complainant has been treated as hostile. The complainant admitted the action taken by the appellant, but according to him, the demand of bribe of Rs.1,000/- was placed before the said Mukesh and not before him. In this contingency, the prosecution has under obligation to examine the said Mukesh is the backbone of the arguments of Shri K.J.Shethna. So the evidence of P.W.1 is not found very useful to prove the initial demand made by the appellant of Rs.1,000/-. The learned trial Judge in the judgment has observed in paragraph no.6 as under :

> *“6. .....However, at the time of examination of the complainant – witness in the Court, the prosecution has faced problems in that the*

complainant has changed his version in the complaint and deposed before the Court that on 23.09.1988, he did go to the place of the accused but along with him there was also a person by name Mukesh who is doing business in the name and style of Mukesh Scale Repairing Works. To whom the Enforcement Directorate of Weights & Measures had given authority for passing the weighing scales and have them duly repaired. In other words, this firm was authorised to carry out the repairs to the scales for being passed by the Directorate for user. It is further stated by him before the Court that it is the said Mukesh who had gone into the house of the accused on 23-9-1988 whereas the complainant was waiting outside his house and it was the said Mukesh who had informed the complainant that the complainant should pay the gratification in the sum of Rs.1,000/- to the accused. He has further stated before the Court that on the appointed day, i.e. The date of

raid, on 26-9-1988, while the accused along with the said Mukesh had come to his shop, the accused never demanded the amount of gratification, but they both had gone into the compound and the office of the complainant where he had delivered the amount to the accused. Thus, there is slight variation which has come in the story of the complainant in that he says that he along with Mukesh had gone to the house of the accused and that it is the said Mukesh who had told the complainant that he should pay gratification of Rs.1,000/- and that there was no actual demand by the accused of gratification at the time of passing of the bribe money.....”

4. It would be very difficult legally for this Court to uphold these findings recorded by the learned trial Judge that this is a case of *“slight variation”* in the story of the complainant. The Court is supposed to look into the integral story placed by the

prosecution, the basic case of the prosecution is that the complainant himself had gone to the residence of the appellant on 23rd September 1988. Of course, the complainant cannot be read the piece of substantive evidence and it can be used for the purpose of seek corroboration and contradiction, but the appellant can very well rely on the conduct of the complainant, which was placed before the officer of the ACB office, who recorded the complaint.

14. It appears that much prior to 23rd September 1988, the appellant had gone and sealed the weighing scale of the complainant and the complainant was being aggrieved by the action taken by the appellant and day-to-day loss, that was being suffered by him, he had gone to the residence of the appellant to pursue the appellant and at that time, appellant allegedly told the complainant to be practical, so he may not face difficulty. The contents of the complainant is required to be proved by the prosecution and in the present case, the version of the complainant is

immaterial conflict with his version in the Court. The Court cannot ignore one more aspect that there is nothing on record to show that only steps were taken by the appellant between 13/14th September 1988 and 23rd September 1988 or by Mukesh. The presence of Mukesh has emerged from the evidence. He is the licence holder and person authorized to correct/repair the weighing scales and measuring instruments of various types used in market and his certificate can be considered by the statutory authority while according approval. M/s.Mukesh Scale Repairing Works can get such weighing instruments and scales approved from the department of the appellant, and so in all probabilities, the said Mukesh must have been introduced in the process of correcting / repairing the scale and also for getting formal approval.

15. Now if the version in the evidence of the complainant is discarded qua two major aspects i.e. the presence of the said Mukesh, when he had gone to the residence of the appellant on 23rd September 1988 and the role played by the

said Mukesh on that day and also about his presence there, when the complainant had gone to the ACB Office on 25th September 1988 criticizing that he has introduced this new story only with a view to help the appellant, then also the story of initial demand cannot be said to have been found proved beyond reasonable doubt on account of material variation.

16. The complainant is a trap witness and a person who was suffering since 13th September 1988 till 25th September 1988, no progress was made, either by the said Mukesh or the complainant. So the evidence of the complainant was required to be scanned closely and it would be risky for the Court to observed that so far as initial demand is concerned, there is no material inconsistency or infirmity which can be ignored. Number of impeachment has been made by the complainant and he admitted in the cross-examination by the learned APP that on the date of trap, the said Mukesh had been to his office and the said Mukesh had told him to give an application and the application was

written by ultimately the said Mukesh. It is come on record that the business of the complainant is not a partnership business, but it is a proprietary firm and proprietor is one Shri Narandas Tirthani and the father of the complainant is Shri Aasandas Tirthani. An application, therefore, was addressed to the junior supervisor, Weights and Measures Department, signed by Shri Narandas, so when the fact of presence of Shri Narandas came on record and it has also emerged that he is the person concerned for the entire transaction during the course of cross-examination of the learned APP.This Narandas ought to have examined by the prosecution. He could support the case of the prosecution qua initial demand made by the appellant. The complainant has categorically denied the suggestion made by the learned APP that the demand of bribe was made by the appellant through the said Mukesh and the amount was also to be given through the said Mukesh. On the contrary, he ha admitted in the cross-examination by the appellant that before going to the residence of the appellant on 23rd September 1988,

initially he had gone to the residence of the said Mukesh, this sounds more probable as the said Mukesh is a licency and dealing in the profession of correcting and repairing of weighing and measurements instrument like scale etc. He must have seen the residence of the appellant. Otherwise, it was not easy or possible for the complainant to reach to the residence of the appellant about 9.00 p.m. It was easy for the appellant to conversant for bribe amount with the said Mukesh. Otherwise, it was not impossible for the appellant to said a filler to the complainant after 23rd September 1988 that he is interesting in settling the issue croup up by accepting the compounding fee provided, his hands is greased. The conduct of the appellant of not demanding anything at the time of entering into the sealing process and absence of evidence of demand of bribe upto 23rd September 1988 is a circumstance which ought not to have been ignored by the learned trial Judge before observing that interrogation of the said Mukesh in the story of the complainant has only slight variation. One crucial aspect is

that the learned trial Judge has not recorded a finding by assigning convincing and cogent reasons that the said Mukesh was not at all there on 23rd September 1988, when the initial demand of bribe was made by the appellant or at the time of lodging of the complaint. The findings recorded by the learned trial Judge that this is a case of slight variation meaning thereby that the story told by a person during the deposition is substantial true, but there is some deviation in describing the story and/or in narrating the sequence of the story. It is difficult for the Court, therefore, to accept that the prosecution has led sufficient evidence as to initial demand of Rs.1,000/- made by the appellant on 23rd September 1988. So there is enough arguments of Shri Shethna that the version of the complainant if read as a whole, then it is clear that he has taken two sharp turns and such a witness could not have been relied on regarding positive findings in favour of the prosecution. One more aspect that has come on record during the deposition of the complainant in the nature of answer

given by the complainant to a question asked by the Court, is also found relevant. According to the complainant, for getting the scale approved from the department, they were asking the repairer-cum-agent and the agent would correct the scale. If need be after repairs, the agent in turn informs the Zonal Inspector and the Zonal Inspector in turn would intimate the time of inspection and in presence of Zonal Inspector, the scale is being measured/tested and then formal approval by passing one more order is accorded. It has come on record that the amount of necessary fee was being paid in the office and he i.e. meaning thereby the complainant, then was getting receipt from them. So the actual act of paying fee by taking chalan in the Government Treasury or formal payment in the office of Weights and Measures Department was not done by the complainant and the same was considered to be a formality. Each department has its own unwritten norms/practice and procedure while dealing with the public or the person concerned with the department and in very few Government departments, there is iron

cartel between the authority and the member of the public; otherwise the administration is being handled in a very casual or informal way, is the experience of the society. In this background, it was not possible for the appellant to raised demand of bribe any time even prior to 23rd September 1988; otherwise he could have made such demand on the day of sealing the scale or he could have given hint to the complainant to pay through the said agent Mukesh. If the appellant was really the corrupt officer, he could not have waited till the arrival of the complainant at his residence. So there is enough strength in arguments of Shri Shethna that the prosecution case is very weak on the point of initial demand made on 23rd September 1988.

17. The PW-2 is a panch witness. He was serving as a Clerk in P.W.D., Panch No.2 was also serving with him as Junior Clerk. This witness has also been treated hostile. Looking to the proceedings drawn by the learned trial Judge, it appears that no formal application was made by learned Public Prosecutor Shri Shaikh

requesting the learned trial Judge to allow him to confront panch witness by showing certain part of panchnama without treating him hostile. The plain reading of the cross-examination made by the learned Public Prosecutor starting from paragraph nos.3 to 5 of deposition at Ex.16, it is inferable that formal approval of treating as hostile and was accorded.

18. The evidence of the panch witness is full of conflict inter-say and also contrary to the material part of the panchnama. He has categorically denied that it was dictated by him that “Shri Vaghela had called the complainant on the backside of his office and, thereafter, the complainant had gone towards the weighing scale from the rear side door which is there in a chowk and he i.e. Panch witness had also followed the complainant. He has denied the suggestion that he had gone outside the office following the complainant. There is reference of walky-talky in his deposition. There is also reference as to its use. Panch witness had seen this walky-talky

set lying in the drawer of the complainant. It was suggested to this witness that it may be a tape recorder. The Investigating Officer has been asked some questions as to availability of the walky-talky instrument. However, the Police Inspector Shri Vyas has denied that in the present case, no walky-talky set has been used. However, he has admitted that his office has provided him a walky-talky instrument and they were making use of such instrument and, therefore, the witness might have felt that the same was used. This answer was given by the Investigating Officer during the cross-examination in his deposition at Ex.19 creates a significant type of doubt. Unless the panch witness is either informed about the availability of walky-talky instrument and so also about its use in carrying out the ACB trap, there was no reason for the panch witness to refer to this instrument during the course of his cross-examination made by the learned Additional Public Prosecutor Shri Shaikh. There was no need for the PW-2 panch to reveal about the availability and presence of this instrument in the office premises of

the complainant. In the same way, there was no reason for this witness to open the drawer of the complainant. There was no scope or opportunity for this witness to look into the drawer of the complainant. It is very likely that without informing the panch, the Investigating Officer may have planted the walky-talky instrument in the drawer and the temptation of the complainant to keep the drawer open to have clear voice reception might have resulted into disclosure of the fact of availability of the said instrument at the spot of raid. There is no reference about opening or closing the drawer in the second part of panchnama drawn and the Investigating Officer has attempted to keep curtain on this entire aspect as to the use of walky-talky. This crucial aspect puts this Court on guard; otherwise there was no reason for the Police Inspector Shri Vyas to keep this aspect behind the curtain by referring to it specifically in the second part of panchnama. On the contrary, this should have been reflected in the first part of panchnama that he ie. Police Inspector Shri Vyas is going to use the walky-talky set

to get some more strength to the genuineness of the raid arranged by him.

19. The learned trial Judge while discussing all the relevant points raised for determination has assigned reasons mainly in paragraph nos.6 and 7 of the judgment and order under challenge. It is true that as per the settled legal position, the evidence of hostile witness is not required to be rejected in toto on account of few infirmities or contradictions in his evidence; and if any part of evidence of hostile witness is otherwise found useful, the same can be read in evidence. IN the present case, while accepting some part of evidence of hostile witnesses namely the complainant and the panch, the learned trial Judge has observed as under :

> *“**6**. ... ... Looking to the trend of the day whereby it becomes impossible for the prosecution to get independent witnesses due to various reasons, the witnesses turn hostile which has become*

a routine affair. If the courts are required to proceed merely on oral deposition before the Court and reject the depositions in toto where the witnesses have turned hostile, then it would would be well neigh impossible render justice in any case. Keeping in mind these state of affairs in the above reported case the Supreme Court has held that "While it is true that merely because a witness is declared hostile his evidence cannot be rejected on that ground alone, it is equally well-settled that when once a prosecution witness is declared hostile, the prosecution clearly exhibits its intention not to rely on the evidence of such a witness and, hence his version cannot be treated as the version of the prosecution itself." It has then been observed in Para-7 of the very reported ruling that "It is now well settled that the principle falsus in uno falsus in omnibus does not apply to criminal trials and it is the duty of the Court to disengage the

truth from falsehood, to sift the grain from the chaff instead of taking an each course of rejecting the prosecution case in its entirety merely on the basis of a few infirmities." As such I cannot adopt the "easy course" of rejecting the prosecution case, based on some few infirmities in the prosecution evidence, on the basis of what Mr.Trivedi want me to do. No doubt I do concede the fact that because of the witnesses turning hostile, the evidentiary value of their evidence is reduced from substantive evidence to a level of second degree evidence. Even treating their evidence as such, things do not end here. I have also to consider the circumstantial evidence. It is also a well-settled position that I have to consider the evidence of the witnesses declared hostile too although upto the stage they were declared hostile by the prosecution. By doing so, the prosecution has brought up a stage whereby it has come in the evidence of the prosecution witness in

form of the complainant, prior to his being declared as hostile, that when the accused had reached his office on 26.9.1988, along with Mukesh, he did give the signal to go to the compound of the complainant whereat the weighing scale was situated. This point is also deposed to and confirmed by the panch witness(Ex.16). ...”

20. The above mentioned reasons assigned by the learned trial Judge exhibit that for linking the appellant with the crime certain crucial facts at least ought to have come on record through the evidence of two key witnesses, namely the complainant and panch. What type of conflict is there in the evidence of the complainant with his previous statement and even the contents of panchnama relied on by the prosecution, has not been discussed in detail. In the same way, there is no detail in the judgment as to the conflict in evidence of complainant and panch no.1 on all material aspects. The learned trial Judge ought to have pointed out the infirmities in the deposition

of panch no.1 in the background of the oral evidence of the complainant, the crucial document-panchnama of trap and the version of the Trapping Officer. Without pointing out each such conflict, when the learned trial Judge has mentioned that there are some inconsistencies and the learned trial Judge has also conceded as reflected in above cited paragraphs about the flaws pointed out by the defence counsel, then before branding those infirmities as minor or negligible or otherwise ignorable in accepting the substratum of the prosecution, the learned trial Judge ought to have discussed these infirmities. It would not be legal to say that the evidence given by this prosecution witness i.e. complainant, upto the point from where he has been permitted to cross-examine treating that witness hostile, should be read as substantive and reliable piece of evidence. On close reading of evidence of these two witnesses namely the complainant and the panch, it only emerges that on the date of trap which was arranged on the complaint of complainant-Raju Tirthani, the appellant had

entered into the business premises of the complainant. Thereafter, the appellant had called the complainant on the backside of the weighing scale. Both of them had gone on the back portion of the office of the complainant. At that time, the complainant had requested the appellant to accept something less than the actual amount demanded by the appellant, and ultimately, the appellant accepted the amount of Rs.900/- instead of Rs.1000/-. Thereafter, the signal was given to the members of the raiding party and the Police Inspector Shri Vyas carried out the raid. It has come on record that the examination of the hands of the appellant, etc. was done with the help of ultraviolet lamp and the hands of the appellant were found stained with anthracene powder. The muddamal currency notes were in the pocket of the appellant, and the currency notes recovered from the pocket of the appellant were the very currency notes which are referred to in the first part of panchnama. It is found that the complainant has not proved practically all the crucial aspects including the recovery of muddamal

currency notes from the pocket of the appellant with the help of panch no.1, and when the panch no.1 has neither proved the substantive part of panchnama nor has even adhered to the story told by him in his complaint, how the complaint can be read as a piece of evidence, is the crucial question and this question has not been answered in a legal or logical manner by the learned trial Judge. It is true that there was no reason for the appellant to go to the business premises of the complainant at a given point of time, but this conduct of the appellant is not inconsistent to his innocence because he has stated in his statement under Section 313 of the Code of Criminal Procedure, 1973 that Mukesh had taken him to the premises of the complainant. This Mukesh is very much concerned with the Weights and Measures Department and he is a person concerned with the statutory formalities which are required to be observed by the Department of the appellant. It is not a matter of dispute that the weighing scale of the complainant was in a sealed condition on the date of complaint and

so also on the date of the trap. The complainant himself was anxious and the said Mukesh was the person who was to complete the formalities being an agent and a person linked with the traders and business personnel using weighing scales and under obligation to get them repaired and maintained in a proper way. It is clear from the evidence that repairers of weighing scales and instruments are simultaneously working as agents and they are completing the formalities in obtaining necessary certificate or order of approval from the statutory officers of the Weights and Measures Department. It is not the case even of the prosecution that initial demand of bribe was made to the complainant. As discussed earlier there was no reason for the complainant to go to the house of the appellant and the complainant must have approached the appellant with the help of Mukesh. As the weighing scale was lying sealed for an unreasonable time, the anxiety of the complainant must be at pick to get it repaired because for want of use of weighing scale he might have started losing everyday income and

such a situation in the market also would take a wrong message in the market. The complainant if has attempted to get his problems solved by any means, then every such mean, according to the complainant, may be justified. It was not impossible for the appellant to insist that he would accept the amount through Mukesh only.

21. Not only that the appellant could have asked the complainant or Mukesh to pay or send the amount of bribe either in his office or at his residence, and only then he would help the complainant. But neither such grave conduct is pleaded by the prosecution nor it has come on record, even indirectly. The prosecution is supposed to establish beyond reasonable doubt that the bribe amount has been accepted under some agreement or understanding between the complainant and the appellant, and to establish the element of understanding or agreement, the demand of bribe amount or illegal gratification is required to be proved beyond reasonable doubt. If the Court finds that there is no reliable, cogent and convincing evidence to establish the demand of

bribe, the evidence as to the acceptance of amount by the appellant should be evaluated with great care and caution.

22. It is true that the appellant can be linked with the crime if strong circumstances are able to establish the case of the prosecution keeping the substratum of the story of the prosecution mainly intact. Keeping the integral part of the prosecution story in mind, if the circumstantial evidence is led or has emerged which can be said to be sufficient to establish the crime beyond reasonable doubt, the appellant can be linked with the offence and it is not always necessary that the prosecution case should be based and supported by the direct substantive evidence of a particular eye-witness, is the present legal scenario. Here it is not the say of the panch witness before the Court that the panch no.1 had seen the actual passing of muddamal currency notes from the complainant to the appellant. It is true that the raid was carried out on getting signal from the complainant but the number of contradictions

which have emerged during the deposition of the panch witness makes the case of the acceptance of the bribe amount shaky.

23. The recovery of bribe amount from the appellant if is found trustworthy and reliable, then reasonable inference can be drawn that the same should have been accepted willfully. But willful acceptance of the muddamal currency notes, according to me, is not sufficient and the prosecution has to establish that it is an acceptance under some understanding or agreement between the appellant and the complainant-bribe giver, and also the Court should make sure that this is not a case of mere recovery of amount. The Apex Court and this Court in ennumber of cases have held that the evidence as to acceptance of amount and mere recovery of the muddamal currency notes from the appellant, are not sufficient grounds to bring home the charge in question.

24. Of course, the learned trial Judge has observed rightly that the circumstances on

record if are eloquent and capable of confirmation of theory of demand of illegal gratification, then the hostility shown by the complainant would not affect the case of the prosecution. The first circumstance relied on by the prosecution is that the appellant was at the business premises of the complainant. But it is difficult for this Court to agree with the finding recorded by the learned trial Judge that there was no necessity whatsoever for the appellant to go to that place at all from where he was found with his hands and shirt stained with anthracene powder. Whether sufficient legal evidence is available on record as to the presence of anthracene powder marks which can be said to be cogent in nature, is altogether a different aspect and this aspect requires separate discussion and evaluation, but the presence of the appellant at the business premises of the complainant is not an incriminating circumstance against the appellant because the appellant was authorised to visit each place and even business premises of the complainant for the purpose of checking and cross-checking and if need be, for sealing

the weighing scales and measuring instruments. In the present case, the weighing scale was sealed by the Department of the appellant. If the appellant or anybody from the office of the appellant is not authorised even to enter into the business premises of the complainant, then who could have checked the weighing scale of the complainant, is the question. Who is the person who had sealed the weighing scale and who is authorised to remove the seal or can ascertain that that the seal is intact or the same is not tampered with, are also the questions. It is the case of the prosecution that Mukesh-an agent i.e. a person who is a link with the Department of Weights and Measures and the persons using such weights and measuring instruments, was already there at the time when the ACB raid was carried out. The appellant had explained that the agent Mukesh took the appellant to the business premises of the complainant and the complainant was ready to pay necessary fees to the Government. It is neither the case of the prosecution nor it is stated by any prosecution witness examined that the

appellant was not authorized either to seal the weighing scale of the complainant or to remove the same. On the contrary, the case of the prosecution is that the appellant was authorised to undergo all statutory formalities either personally or with the help and assistance of his staff members or the person who can help the department.

25. It is true that after application of seal by Department on the weighing scale of the complainant and as the weighing scale of the complainant was frozen by the appellant, the complainant may have developed anxiety to get his weighing scale released from freezing order and also removal of seal. Now it is not the case of the prosecution that the complainant had rushed to the appellant for removal of seal, etc. immediately during some hours, not even on the next day. The appellant had gone to the complainant on 26th September, 1988, but it would be extraneous to infer that the visit of the appellant depicts over-anxiety of the appellant. The complaint was taken by the Police Inspector, Anti-Corruption

Bureau (ACB), at 16-30 hrs. on 25th September, 1988 i.e. on the previous day of the trap and the trap has been carried out on 26th September, 1988 between 10-00 a.m. and 12-00 p.m. As per the case of the prosecution, the appellant had been to the business premises of the complainant on 13th September 1988 and the complainant was informed by the appellant that the complainant has failed in getting his weighing scale repaired and approved, and the complainant must be knowing that it is an offence. The complainant was in awkward box as he had failed in complying with the statutory requirement and so the complainant had quoted the name of one Shri Mukesh, Weighing Scale Repairing Works and had stated that this work has been handed over to Shri Mukesh. On that very day the appellant had sealed the weighing scale and frozen memos were also issued. When it is in evidence that the appellant with Mukesh, an agent and repairer of weighing scale, had gone to the business premises of the complainant on 26th September 1988and this is a mere probable situation, then the visit of the appellant with Mukesh on 26th September,

1988, at the business premises of the complainant cannot be equated with guilty conduct. 26th September, 1988 was Monday. If the appellant was really corrupt, he could have permitted the complainant to remove the seal and start using the weighing scale immediately after 23rd September 1988 itself and other formalities could have been completed on 26th September, 1988. That on failing to comply with the demand of bribe by the appellant, the complainant could be put to more serious complications. On the contrary, it is the say of the prosecution that the appellant had said that on Monday he would come to the business premises of the complainant and would give Chalans and on receiving the said Chalans, the complainant should pay an amount of Rs.2000/- in the bank. When the presence of Mukesh at the spot has not been disputed even by the prosecution and he was cited as witness, the presence of the appellant at the business premises of the complainant whether is a circumstance leading to guilt, is a question and according to me, the same has not been addressed correctly by

the learned trial Judge. The learned trial Judge has mainly focused on the evidence of recovery of bribe amount from the appellant; and the hands and shirt of the appellant found stained with anthracene powder. When the presence of the appellant at the business premises of the complainant was not inconsistent to his innocence and is not capable to point out a conduct towards guilty mind only, then what weightage should be given to this set of circumstances i.e. visit of the appellant to the business premises of complainant on the date of trap. This requires a close consideration of the evidence led by the prosecution as to the acceptance of the bribe amount and the recovery of the same because serious impeachments have been made against the said Mukesh. It is alleged by the appellant that Mukesh has used the complainant and the complainant was also angry because of the action of the appellant of sealing his weighing scale for the last more than 10 days. Both of them i.e. complainant and Mukesh, had arranged the trap with the help of Police Inspector, ACB. The status of Mukesh emerges

to be of a trap witness and it is alleged in the complaint that the initial demand of bribe amount was made by Mukesh to the complainant. However, the complainant's evidence is that the complainant along with Mukesh had gone to the residence of the appellant and Mukesh had some discussion and after coming out of the house of the appellant, Mukesh informed him that the appellant is demanding an amount of Rs.1000/-, over and above the amount of Rs.2000/- of compounding fees, and the appellant had assured Mukesh that on 26th September, 1988, they will be given Chalan to deposit the amount of Rs.2000/- and at that time, the amount of Rs.1000/- shall have to be paid to the appellant. The complainant has accepted the fact of Mukesh accompanying him on 23rd September 1988, though this has not been mentioned in the complaint. If Mukesh was not in picture at all, why the appellant should take Mukesh with him or unless the appellant had informed Mukesh about his proposed visit to the business premises of the complainant on 26th September, 1988 and how Mukesh would come to know that he has to

accompany appellant between 10-00 a.m. and 12-00 p.m. on 26th September, 1988. It is the case of the prosecution, and for that prosecution relies on the panchnama-a vital document, that one person had entered the business premises of the complainant with appellant and during raid, the person who had entered with appellant was Mukesh Prahladbhai Patel of M/s.Mukesh Scale Repairing Works situated at Ghee Kanta, Panchabhai-ni-Pol, Ahmedabad. It is also mentioned in the said panchnama that Mukesh has emerged as a person who had prepared the application on the letter-pad given by the complainant. Two such applications were prepared. So the say of the complainant before the Court if is found useful to any of the parties including the appellant, it can be considered and the appellant can rely on such evidence in carving out probable defence. With this situation, the case of the prosecution goes under great shadow of doubt that the amount of Rs.1000/- was demanded by the appellant from the complainant on 23rd September 1988. When the person who was genuinely present when the raid

was carried out and a specific plea of inimical feeling that might be working in the mind of Mukesh was taken by the appellant, the prosecution should have examined Mukesh instead of dropping him.

26. Ultimately, the trial is nothing but a fact finding mission and the Court has to find out truth by separating chaff from grain and for that if need be, the Court shall exercise powers vested with the Court under Section 311 of the Code of Criminal Procedure, 1973 and Mukesh could have been examined as the Court witness to ascertain whether the defence plea is a lame excuse or has any strength in it. The Court is conscious that bare suggestion made to a prosecution witness by a defence counsel or the lawyer's imagination placed on record in the nature of suggestion to carve out a defence plea cannot be equated with a substantive piece of evidence but for such or similar propositions only, the defence can put some seeds which ultimately grow during the trial proceedings. Here in the present case, to prove the fact of demand from the

complainant, the evidence of Mukesh would have helped the prosecution substantially because he was the person in close vicinity immediately prior to acceptance of the alleged amount of bribe or illegal gratification. It is not the case of the prosecution that the appellant had accepted an amount of Rs.3000/- i.e. Rs.2000/- towards compounding fees and Rs.1000/- towards illegal gratification. A person who goes prepared with Chalans would have accepted the entire sum of Rs.3000/- or insisted for payment of the entire sum. Thus, the Court finds some force in the argument of Shri K.J.Shethna, learned counsel appearing for the appellant, that with this totality of evidence on record, the learned trial Judge ought not to have held that the initial demand has been proved by prosecution; on the contrary, the learned trial Judge was required to observe that the allegation of initial demand of bribe by the appellant from the complainant on 23rd September, 1988 or any subsequent day or time prior to the raid, was made by the appellant from the complainant as there is no corroborative piece of evidence.

It is neither the say of the panch nor mentioned in the panchnama that the demand of bribe amount of Rs.1000/- was made by the appellant on the date of raid immediately prior to its alleged acceptance.

27. In view of above discussion, it is also necessary to observe that non-examination of Mukesh is an important lacuna capable of affecting the strength of the case of the prosecution. It is true that if the learned Public Prosecutor was of the opinion that Mukesh being closely connected professionally with the complainant and had also some inimical feelings towards present appellant, he could have examined panch no.2 to prove the important contents of second part of panchnama. So as such there is neither independent support to the case of the prosecution that the amount of bribe was demanded by verbally or by gestures immediately prior to acceptance of the amount by the appellant nor it has come on record under which the element of hidden demand of bribe can be inferred. It is likely that a

clever accused may not initiate talk about amount of bribe demanded earlier and the ice-breaking may be from the complainant. But before touching the currency notes by the accused, if no such utterance is found to have been made by the complainant, it would be risky for the Court to infer that the appellant had accepted the amount as bribe or illegal gratification. Under a strong circumstance also, the prosecution can prove the element of hidden demand in accepting the muddamal currency notes. Some understanding or element of agreement could have been brought on record but on the contrary, it appears that the appellant has attempted to proceed as per the procedure, otherwise by accepting the amount of bribe and handing over the Chalans to the complainant prepared by him, he would have simply walked away with the instructions that he and/or Mukesh should come to his office with two different applications, and thereafter necessary procedures shall be completed at the earliest. Nothing would have gone wrong against the appellant if he would have removed the seal when he had gone on the

backside of the office premises towards the weighing scale which was lying sealed. On the contrary, it appears that the complainant and Mukesh both were interested in seeing that the appellant touches or accepts the amount of Rs.1000/-. Simultaneously, both these persons were interested in getting the seal removed either by paying the amount or by bringing any type of pressure on the appellant. So the status of the complainant is found to be of accomplice. True it is that in the case where payment of amount of bribe is not voluntary, very slight corroboration would be sufficient to make the evidence of accomplice admissible against the receiver of the bribe. The learned trial Judge has discussed this point of law in detail but it appears that when some part of judgment treats the complainant as an unreliable and hostile witness to the prosecution, and when this Court also finds that there are material conflicts in the evidence of the complainant as well as panch interse, and also between the version of the complainant and the panchnama, the discussion made by the learned trial Judge regarding

prevailing law on appreciation of evidence of an accomplice has very little relevance.

28. One more crucial question is as to why the appellant had gone to the business premises of the complainant with prepared Chalans which have been recovered by the Investigating Officer-Trapping Officer. The muddamal Article no.5 is forms of chalan which are four in number. It emerges that the appellant is not the officer who has no authority whatsoever to touch the currency notes and under the given circumstance, the amount can be sent to the Government Treasury with Chalans through peon or any other subordinate employee of his office. Of course, it is neither the defence of the appellant nor suggested to prosecution witnesses and it would not be legal for this Court to rely on such surmise or conjecture. But as discussed hereinabove, some Government officers keep tendency to help the person concerned with his department to the maximum who by doing some work earns money or recovering the amount for the Government. So in all cases, some overdoing about the

Government employee should not be taken as an incriminating circumstance against him. Of course, while appreciating the evidence totally if such circumstance is found helpful to the appellant, it can be made use of. The appellant has stated in his statement under Section 313 of the Code of Criminal Procedure, 1973, that he is considered to be the strict officer in the department, and therefore, there was agitation against him by the traders, agents, etc. when he was at Kheda and he was given police protection. Thereafter, he was transferred from Kheda district to another district. He has also stated that he had filed two cases against the Weights and Measures instrument users and, therefore, Mukesh might have generated inimical feeling. In absence of evidence of Mukesh, it would be difficult for this Court to ignore this explanation given by the appellant and, therefore, it is possible to infer that the case of the complainant probably was the third case against the weighing scales repaired and maintained by Mukesh Scale Repairing Works.

29. When the panch has not proved by way of his evidence that he had seen the actual passing of currency notes from complainant to the appellant, and it is not the claim of the Trapping Officer that he is an eye-witness of passing of muddamal currency notes from the complainant to the appellant, the contents of this part of panchnama could not have been relied or considered by the learned trial Judge. The facts proved during the course of cross-examination by proving contradictions would not take the shape of a substantive piece of evidence. It simply establishes the case of the prosecution or contingency in the case of prosecution. Plain reading of the judgment of the learned trial Judge takes me to a conclusion that the learned trial Judge while appreciating the oral evidence led by the prosecution has failed in considering this crucial legal aspect and as the learned trial Judge has tempted to read certain part of complaint and second part of panchnama, as a substantive piece of evidence, even then such part of contents of complaint or panchnama cannot be said to have been proved legally.

30. The presence of appellant at the spot on the day of trap was not bona fide and he had entered the business premises of the complainant with dishonest intention and to obtain illegal gratification other than regular remuneration, is one of the inferences drawn by the learned trial Judge and for drawing this inference, the learned trial Judge has appreciated certain aspects. It is observed that the visit must not be a visit for the purpose of checking the seal and to ascertain whether the same has been tampered with or not, otherwise it would have been a surprise visit. This logic is not found correct because existence of seal or the act of tampering with the same is a verification which can be said to be physical, and for making physical verification in all cases, surprise visit is not required to be made. It depends on the type and article which requires to be verified. If the strength of students or a live-stock in Panjarapole are required to be verified, a surprise visit would give correct and better result. But any superior if wants

to ascertain that the seal applied by him requires verification, it can be inspected any time even by asking his subordinate to bring the box before him on a given day and time, and can ascertain that the seal is intact or not. At one place in the judgment, the learned trial Judge has observed that there was no scope or need for the appellant to enter into the business premises of the complainant and at some other place in the judgment, the learned trial Judge has observed that the appellant at the most could have paid a surprise visit to ascertain the same. True it is that the visit of the appellant was a pre-arranged visit. The crucial question which was required to be addressed is whether the appellant had informed the complainant that he would bring Mukesh with him or whether there is any scope, considering the nature of evidence led, coupled with the fact of non-examination of Mukesh that on 23rd September 1988, the complainant may have gone to the residence of appellant with Mukesh. It is possible to infer that the complainant was either known or aware that Mukesh was going to

accompany the appellant. It was possible for the complainant to state these facts at the time of giving complaint that the appellant may come or may not come with Mukesh or he may have suppressed this aspect while giving complaint with some motive.

31. One more glaring fact which has been mentioned earlier in this judgment is that there is clear reference in the evidence led by the prosecution as to the use of one walky-talky set. The Investigating Agency has tried to put curtain as to the use of walky-talky set. The Investigating Agency has thus stated that the department has provided them walky-talky sets and one of the instruments was kept in the drawer of the complainant. This crucial aspect which has emerged from the evidence has very significant impact. The use of walky-talky set whether was the brain child of the lawyer defending the appellant or this fact has come on record during the examination of witnesses genuinely, is an area of appreciation, and the learned trial Judge appears to have not dealt with this part of evidence. If really the

walky-talky set was used and kept in the drawer of the complainant, it can reasonably be inferred that the said set at least must not be lying dead. There are two possibilities viz. the person who was instructed to push the 'ON' button may not have acted promptly at right point of time or the officer holding the receiver set may not have heard any conversation which can help the prosecution even indirectly. Here whether the receiver set or the walky-talky set was ever used to carry out a successful trap in the present case, is also a question and it appears clearly that the Investigating Officer has tried to keep curtain on this entire aspect. The answers given to the defence counsel in this regard are not found sufficient to rule out the possibility of use of walky-talky set while carrying out raid in the present case. On the contrary, the say of Shri K.J. Shethna, learned counsel appearing for the appellant, gets some force that as there was nothing in the conversation between the complainant and the appellant, which can prove the handing over and taking over the muddamal currency

notes as illegal gratification or the bribe amount, the Investigating Officer has suppressed the fact as to the use of technique deployed by him; otherwise he could have said that the walky-talky set was given to a particular officer, but for the reasons best known to either panch or complainant, the 'ON' button was not operated at crucial moment by any one of them, and therefore, the Investigating Agency could not listen the conversation or the type of discussion that had taken place or he could have said that the reception was very weak and therefore, the Investigating Agency could not hear the conversation, but there is no need for the prosecution to keep curtain on this crucial part of evidence.

32. If the appellant had actually demanded the amount of Rs.1000/- and the entire sum was to be given to the appellant as arranged by the Trapping Officer and the complainant and panch were instructed to act accordingly, the entire bunch of muddamal currency notes could have been given/ handed over to the appellant. It

was not impossible for the complainant and the Trapping Officer to carry out the raid more genuinely by planning in that direction so that the appellant can be compelled to enter into a conversation about the amount and its nature. Though it was not planned, the complainant claims that he entered into conversation and requested the appellant to accept something less than Rs.1000/-. The amount of Rs.900/- was given and it is the say of the prosecution that the appellant had said that the amount of Rs.900/- would suffice the purpose.

33. It is not the case of the prosecution that the amount of Rs.900/- was demanded. Now the alleged recovery is of Rs.900/-. The attempt to converse with the appellant makes prosecution case doubtful as to the initial demand made by the appellant to the complainant only and the demand of bribe was not conveyed through Mukesh. Whether it would be safe for this Court to accept the bare words of the complainant as gospel truth regarding this part of conversation, is also a

question, when rest part of the evidence of the complainant has not been found acceptable by the learned trial Judge and the prosecution itself has not placed reliance on this evidence. Whether this small part of deposition of the hostile witness could have been accepted to link the appellant with the crime, is also one of the important aspects but the law is that the sub-stratum of the story of prosecution case should be found intact. It is argued by Shri Shethna that the integral part of the story of the prosecution firstly should be established and only thereafter the Court should think of ignoring certain infirmities or conflicts in the evidence which are insignificant in nature. Here the story which has come on record is not in conformity of with the basic story placed by the prosecution. There was no need for the complainant to enter into such a conversation. He ought to have acted as per the instructions given by the Trapping Officer at the time of drawing first part of panchnama. This part of evidence makes the case of the prosecution weak with regard to acceptance of amount by

the appellant as bribe amount or illegal gratification or acceptance itself.

34. The learned trial Judge has concentrated mainly on the evidence of the Trapping Officer. True it is that a conviction can be based on the evidence of the Trapping Officer only if the Court is able to hear the ring of truth in his evidence. However, in most of the decisions this Court as well as Apex Court has observed that while accepting the version of the Trapping Officer and linking the appellant with the crime on the strength of the evidence of the Trapping Officer, the Court should try to seek some corroboration as a rule of prudence. The Police Inspector examined in the present case is undisputedly the Trapping Officer and a person heavily interested in success of the trap. He has been impeached during his cross-examination and by placing some other part of evidence mainly of panch witness that he had not acted fairly in selecting the panchas. The Police Inspector Shri Vyas has accepted in terms during the course of his cross-examination that he had

directed to bring panchas from the office of the Executive Engineer situated near Gujarat College. It is true that the selection of panchas from a particular office of the Government would not make the selection of panchas bad or such selection normally should not viewed with doubt. Sometimes only with a view to change the selection of the department, the Trapping Officer may suggest his subordinate staff to go to the office of a particular department or not to go to a particular department. But here in the present case, something more than the suggestion of the office of the Executive Engineer has come on record. The Police Sub-Inspector had informed Shri Vyas, Investigating Officer, telephonically that arrangement for panchas has been made. After meeting both the panchas, Shri Vyas had realised that one of the panchas had already helped/ assisted the ACB Department and particularly to Shri Vyas and that panch had accompanied him in an ACB trap case arranged at village Valad. It is also accepted by Shri Vyas that the said trap had failed. At least out of two panchas, one who

had accompanied Shri Vyas in a trap case at Valad, ought to have been replaced by any other person. The explanation given by Shri Vyas is not found acceptable, whereby he has stated that the panchas of a successful trap are not normally called again to assist the ACB department as panch. Meaning thereby, the panch who had accompanied the ACB team in a failed trap case can be called again. It has come on record that as per the impression of Shri Vyas, Investigating Officer, this panch was serving in the Stores Section of office of the Executive Engineer and the Store Keeper of the Store was one Shri Vyas and co-incidentally the said Store Keeper Shri Vyas is the first cousin of Police Inspector Shri Vyas i.e. the Trapping Officer. So a panch who had been with Shri Vyas at Valad and serving under his first cousin was again called to act as panch in the present case. This very witness has referred to use of walky-talky set in the raid carried out during the course of cross-examination made by the learned Public Prosecutor (this part of evidence is at page no.59 of the paper-book).

35. As discussed earlier, it has emerged from evidence that the Trapping Officer has tried to keep curtain on the very crucial aspect as to the use of walky-talky set. Though the Trapping Officer himself is the Investigating Officer who has investigated the crime, he has not cared to examine whether PW-Mukesh had any inimical feelings towards the appellant or not. When it has emerged that it was Mukesh who failed in repairing the weighing scale of the complainant and getting the formal approval as an agent working for the complainant and had failed in getting the seal removed expeditiously, he may have taken help of the complainant in trapping the appellant. The motive or intention is always hidden in the mind of the accused is the very well accepted proposition of law. In the same way, the motive or intention may be hidden in the mind of the complainant or the person interested in trapping a Government Officer. Clear suggestions have been made in the present case that the appellant when was serving in some other part of the State i.e.

at Kheda District, the traders had agitated against him and he was given special police protection. A corrupt officer would not seek any protection that too of Police personnel because the security personnel would be the first hurdle in continuing his corrupt practice. On hue and cry made by the traders, a corrupt officer would conveniently get himself transferred. It is specifically stated by the appellant that because of this strict approach, the traders have started some movement against him and, therefore, he had sought for protection and, thereafter he was transferred. As discussed earlier, two cases against Mukesh were already pending instituted at the instance of the appellant. Over and above this aspect, there is inconsistency in the evidence of prosecution that actually who took out the currency notes from the pocket of the appellant and at whose instance. Obviously as panch has supported the case of the prosecution wholly and he has been treated hostile, the Court whether should confirm the conviction saying that second part of panchnama has been satisfactorily proved by

the evidence of cogent nature given by the Trapping Officer, is the question. If the answer is in affirmative, only then there would have been a scope to raise a presumption against the appellant. According to me, it would be unsafe for this Court to accept the evidence of the Investigating Officer as his evidence does not get corroboration by legal and satisfactory evidence. It is not a matter of rule to seek corroboration, however, in the aforesaid circumstances, this is case where as a rule of prudence, the learned trial Judge ought to have sought for satisfactory corroborative piece of evidence. A weak witness or an unreliable witness cannot provide corroboration just as a fused bulb cannot throw light to another bulb. The case of the prosecution when is resting purely on circumstantial evidence, such a circumstance or circumstances are required to be established by legal and convincing evidence, and if the circumstances are more, the link between these circumstances is also required to be again established by evidence of legal nature.

36. Shri K.J. Shethna, learned counsel appearing for the appellant, has placed reliance on one decision in the case of ***Gulam Mahmood A. Malek v. State of Gujarat, reported in 1980 (supp.) SCC 684***, wherein in paragraph nos.6 and 7, the Apex Court has observed that the evidence of the complainant himself if is in the nature of accomplice and his story is prima facie suspicious, the corroboration in material particulars is necessary and failure to examine independent witnesses naturally present on the occasion is very significant. Here in the present case, it is the say of the prosecution that Mukesh was agent and was a link with the business personnel and the Department of Weights and Measures. I have carefully gone through the scheme of the relevant Act and the Rules framed thereunder. Undisputedly, this Mukesh was given licence to repair the weighing scales and he could have received the certificate of approval from the department for his customers. His conduct on the date of trap was pro-complainant, is the

theory of prosecution. Therefore, he was accepted as prosecution witness, otherwise he could have been joined as co-accused. So non-examination of Mukesh, as observed earlier, would go to the merits of the prosecution case. For the sake of brevity and convenience, the Court would like to reproduce the relevant paragraph nos.6 and 7 of the cited decision, which are as under :

> ***"6.*** *In appreciating the evidence in this case the background should not be forgotten. The complaint was prepared by Natverlal who was accused in at least four cases. He did not have the least compunction in saying that he used to given money to the accused on several occasions. His case that he gave a bribe on 7-7-72 was rejected. His complaint that bribe was demanded on 7-7-72 was lodged only on 17-7-72. Apart from the fact that the complainant is in the nature of an accomplice, his story prima facie is suspect. Before any court could act on*

his testimony, corroboration in material particulars is necessary. The prosecution relies only on the evidence of Kirti Kumar, the pench witness for corroboration. Kirti Kumar is a student and employed in the office of Tube Well Maintenance Department which is in the same building as that of the Anti-Corruption Department. No doubt, there is no evidence that he is inimically disposed against the accused but he admitted that though his office usually starts at 10.30 A. M. he came to his office on that date at 8.45 A. M. and joined the party who conducted the raid. Though the panch witness corroborates the complainant, regarding the recovery, the delay in effecting the recovery of the money, the failure to examine independent witnesses who were admittedly in the court hall and in the next room to which the accused was taken, and the recovery made, makes the entire prosecution case unacceptable.

7. *The High Court while agreeing with the trial court that the evidence of Natvarlal in suspicious and that it cannot be acted upon without sufficient corroboration found that the testimony of the Panch witness was acceptable and afforded sufficient corroboration. The High Court based the conviction mainly on the ground that the marked notes were recovered from the person of the accused and that panch witness has spoken to the recovery of the money. In assessing the evidence of a witness the entire background of the prosecution store should be kept in mind. It is seen the complainant has no regard for truth and his preferring a false complaint about payment of bribe on 7-7-72 and making the present complaint after ten days of the alleged demand cannot be ignored. In the circumstances, we do not think that it was safe for the High Court to base the conviction solely on the testimony of the Panch witness. The trial court has given convincing reasons as to why the*

evidence of the panch witness cannot be accepted. In reversing the order of acquittal the High Court must find sufficient grounds for holding that the appreciation of the evidence by the trial court is unsupportable. On going through the evidence in the case, we feel that the trial court was right in not accepting testimony of the complainant and the panch witness and the High Court was not justified in interfering with the order of acquittal."

37. The above principle is an accepted principle of law since years and Shri K.J.Shethna, learned counsel appearing for the appellant, has drawn attention of the Court to one more decision in the case of ***Habeeb Mohammad v. State of Hyderabad, reported in AIR 1954 SC 51,*** wherein the Apex Court in paragraph no.11 as observed that *it is the bounden duty of the prosecution to examine a material witness, particularly when no allegation has been made that, if produced, he would not speak the*

truth. Not only does an adverse inference arise against the prosecution case from his non-production as a witness in view of illustration (g) to Section 114 of the Evidence Act, but the circumstances of his being withheld from the Court casts a serious reflection on the fairness of the trial. This cited decision refers to two earlier decisions i.e. one reported in ***AIR 1936 PC 289*** and another reported in ***AIR 1945 PC 42***. Of course, the decision reported in ***AIR 1945 PC 42*** has been distinguished by the Apex Court by this cited decision in the case of Habeeb Mohammad (supra).

38. Shri K.J. Shethna, learned counsel appearing for the appellant, has also placed reliance on one another decision in the case of ***Hargovind Tejabhai Parmar v. State of Gujarat, dated 02nd February, 2003, passed by this Court (Coram : D.P. Buch, J) in Criminal Appeal No.743 of 1991***. In this cited decision, this Court has dealt with one crucial aspect which is also relevant in the present case, and it has been

observed, of course relying on earlier decision of the Apex Court and this Court, that mere acceptance of money or recovery of muddamal currency notes is not sufficient to convict the appellant for the offence punishable under the provisions of the Prevention of Corruption Act. For the sake of brevity and convenience, I would like to quote relevant paragraph nos.31, 32 and 33 of the above cited decision, which are as under :

> ***"31.*** *In other words, I am of the opinion that the prosecution cannot be said to have proved beyond any reasonable doubt that the said amount was demanded and accepted by the appellant from Shankarbhai Zavrabhai for better treatment to his father. It is, therefore, clear that the appellant would naturally be entitled to a benefit of reasonable doubt. At this stage, the learned APP had drawn my attention to the decision of State of Gujarat Vs. Tajbhai Karimbhai reported in 1999(1) GLR 831, wherein it has been*

observed that the demand of bribe money is not an essential ingredient of an offence.

32. *However, in a decision of the Hon'ble Apex Court rendered in Subash Parbat Sonvane Vs. State of Gujarat, reported in 2002(2) GLH, 654, it has been observed that there was mere acceptance of money but there was no evidence of demand and therefore, the accused was ordered to be acquitted. In the present case, we find that so far the acceptance of bribe amount is concerned the evidence is not complete. Hence, the evidence of demand and acceptance of bribe money through the evidence of recovery of muddamal currency notes becomes doubtful. In view of the above fact that the informant has not supported the case of the prosecution, the first panch has passed away and the second panch and I.O. were not witnesses to the said event of alleged demand and acceptance, I am of the view that when two*

ingredients have not been satisfactorily established and the third becomes a matter of reasonable doubt, it would not be proper for the Court to convict an accused person for a serious offence punishable under the said Act.

33. *It is, therefore, clear that the prosecution cannot be said to have proved beyond any reasonable doubt that the present appellant had demanded and accepted the amount of bribe of different amounts, at three differed occasions, on three differed dates, as has been alleged against the appellant. The said fact has not been proved beyond any reasonable doubt. It is, therefore, required to be held that the trial court has not properly appreciated the aforesaid factual aspects, about the requirement of evidences and about the demand and acceptance of bribe money and the recovery thereof. It is more so, when the concerned witnesses have not*

supported the case of the prosecution and the witnesses who have supported the case of the prosecution were not in a position to depose anything about the said three ingredients. The judgment and conviction order of the trial court are therefore not sustainable. The appeal is therefore required to be allowed and the judgment and conviction order of the trial court are required to be set aside."

39. The learned trial Judge has treated the presence of appellant at the business premises of the complainant as a direct circumstance against him erroneously. Of course, this circumstance may have ultimately helped the prosecution provided totality of other circumstances proved by legal and convincing evidence are found sufficient to draw such inference against the appellant. It would not be safe or legal for this Court to express any agreement with the inference drawn agains the appellant because the entry of the appellant in the business premises of the complainant

was neither surprising nor unauthorised.

40. In the present case, the reference of walky-talky is not there in the panchnama. However, perhaps such an instrument was used in the present case has emerged as a strong probability because during the course of cross-examination of panch witness made by learned Public Prosecutor, this aspect has come on record. Of course, the learned Public Prosecutor has tried to kill the ghost which had entered into the evidence by referring to panchnama. The learned trial Judge has put a pointed question, it seems, as to the use of walky-talky and the answer was given by Police Inspector Shri Vyas to the learned trial Judge and thereafter, while answering the question posed by the defence counsel, it has come on record that his office was using the walky-talky, and such an intrument is provided to his office and if such an instrument is to be used, then either complainant or panch obviously has to be asked to remain near the said instrument so that the same can be operated. According to Police Inspector Shri

Vyas, this instrument was not used in the present case. The crucial question which has emerged before this Court is, how the panch would come to know that such an instrument has been given to the office of the ACB and they are also using such an instrument. One answer given by Police Inspector Shri Vyas is required to be reproduced to appreciate the strength of the evidence given by Police Inspector Shri Vyas, wherein he has stated, *"We have been provided walky-talky sets by the office and it was used as an experiment. Perhaps, therefore, the witness might have felt so."* It is further stated by this witness, *"But while doing this experiment, no changes were made in the instructions given to witnesses earlier."* This evidence exhibits the element of absence of fairness and transparency on the part of the Trapping Officer. Now whether on the strength of the evidence of Police Inspector Shri Vyas any legitimate presumption could have been drawn, is the question which has been strongly posed before this Court by Shri Shethna, learned counsel appearing for the appellant. Unless

the Court is satisfied about the acceptance of the amount as bribe amount or illegal gratification, no presumption can be drawn. In the case of ***State of Andhra Pradesh v. T. Venkateshwara Rao, reported in AIR 2004 SC 1728***, the Apex Court has observed that the fact established by the prosecution should lead to irresistible conclusion that the amount was received as bribe amount by the appellant. The facts of this decision are a bit different. But this Court cannot ignore the ratio of the decision reflected in paragraph nos.6 and 7 of the above cited judgment. For the sake of brevity and convenience, I would like to quote the said paragraph nos.6 and 7, which are as under:

> ***"6.*** *Having heard learned counsel for the parties and having perused the records, we are unable to accept the argument addressed on behalf of learned counsel for the appellant. We think the High Court was justified in coming to the conclusion that the contract for which PW-1 had offered his bid was only*

under consideration and was not finally accepted therefore, the question of the respondent agreeing to give the work order on payment of bribe did not arise. The High Court was also justified in coming to the conclusion that on 24-4-1987 between 11 a.m. and 1 p.m. respondent was not in his office hence the prosecution case that PWs-1 and 2 approached him in his office on that day to pay the bribe cannot be accepted. The High Court was also justified in coming to the conclusion that no reasonable man would have agreed to accept the bribe in the presence of PW-2 who admittedly had a grievance against the respondent. These findings, in our opinion, are based on material on record and there is no perversity involved in the conclusions arrived at the High Court in regard to these findings. Though learned counsel for the appellant is justified in contending that PWs-4 and 5 are independent witnesses hence their evidence ought not to have been

rejected by the High Court, in our opinion the fact that they are independent witnesses ipso facto does not establish the prosecution case that the respondent demanded or received a sum of Rs. 400 in the form of tainted currency notes on the said date. Their evidence only establishes the fact that when they entered the house, Rs. 400 was recovered from under the mattress in the best-room of the respondent and on testing the respondent's hand tested positive for having handled the tainted money. The evidence even if it is accepted as true would not lead to an irresistible conclusion that this money was received by the respondent as bribe money because of the explanation given by the respondent wherein it is stated that the money in question was kept in advance by PWs-1 and 2 before his arrival in the house and he was asked to bring that money by PWs-4 and 5 when they came to his house which he did. Because of his handling the currency, he came in contact with the

phenolphthalein powder. Bearing in mind the findings of the High Court in regard to the genesis of this bribery demand we think the explanation given by the respondent by way of defence and supported by evidence cannot be rejected as improbable or farfetched.

7. In this view of the matter, we find no merit in this appeal. The appeal fails and the same is hereby dismissed."

41. Shri K.J. Shethna, learned counsel appearing for the appellant, has also relied on one more decision in the case of ***Mahmoodkhan Mahboobkhan Pathan v. State of Maharashtra, reported in AIR 1998 SC 2346***, wherein the Apex Court has mainly observed in paragraph no.7 as under :

"7. The primary condition for acting on the legal presumption under Section 4(1) of the Act is that the prosecution should have proved that what the

accused received was gratification. The word "gratification" is not defined in the Act. Hence it must be understood in its literal meaning. In the Oxford Advanced Learner's Dictionary of Current English, the word "gratification" is shown to have the meaning "to give pleasure or satisfaction to". The word "gratification" is used in Section 4(1) to denote acceptance of something to the pleasure or satisfaction of the recipient. If the money paid is not for personal satisfaction or pleasure of the recipient it is not gratification in the sense it is used in the section. In other words unless the prosecution proves that the money paid was not towards any lawful collection or legal remuneration the Court cannot take recourse to the presumption of law contemplated in Section 4(1) of the Act, though the Court is not precluded from drawing appropriate presumption of fact as envisaged in Section 114 of the Evidence Act at any stage."

Of course in this cited decision, the facts are materially different because the plea taken by the accused was of justification and it was submitted that the amount has been received as advance money which is required to be collected as per the rules in force. But the observation of the Apex Court which lays down the law is that the prosecution is under obligation to establish that the amount has been accepted as bribe amount or illegal gratification and was recovered from the appellant or from his conscious possession. In the above cited decision in the case of Mahmoodkhan Pathan (supra), the recovery was not challenged. In the present case, the recovery of amount from the appellant is under a great shadow of doubt. So on both the counts, in the present case, the case of the prosecution is found weak; (i) for want of sufficient evidence, it would be difficult for this Court to accept that the amount was tendered and given by the complainant as an illegal gratification, and knowing it to be illegal gratification, the appellant had

accepted the same and (ii) for the sake of argument, if it is accepted that the amount was found from the pocket of the appellant, whether the case can be said to be a mere recovery of the amount and secondly when it is settled that mere recovery of muddamal currency notes from the possession of the appellant is not sufficient to link the appellant with the crime, especially when the defence is that he has been falsely implicated in the trap.

42. It is categorically stated by the appellant that one Prahladbhai is the owner of Mukesh Weighing Scale Repairing Works, and this Prahladbhai had threatened the appellant, and therefore, he was served with a notice and the superiors of the appellant had also warned the said Prahladbhai.

43. In the case of ***Suraj Mal v. the State (Delhi Administration), reported in 1979 Cr.L.J. 1087***, the Apex Court has observed that mere recovery of money from the accused is not

sufficient. In the case of bribery, mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable, is the ratio of the cited decision. I do not think it necessary to reproduce the relevant paragraph no. 2 of the said decision on the strength of which the conclusion has been recorded by the Apex Court in the cited decision.

44. The effect and impact of use of anthracene powder in ACB trap has been brought under a serious debate before this Court as well as Apex Court in number of cases. When assistance of evidence of scientific nature is found important, it is observed that it is always safe and necessary to use the phenolphthalein powder. In the present case, the anthracene powder was used by the Trapping Officer Shri Vyas. In most of the cases, the assistance of Scientific evidence is not found very material or vital. So the use of anthracene powder has not been held fatal to the entire trap

exercise. On the contrary, the evidence as to the presence of anthracene powder marks on the hands of the appellant or on the clothes or any other article of the accused, has been looked into and the same even is being considered as good corroborative piece of evidence. But in some cases where there is no direct evidence either of the complainant or panch or both as to the conversation between the complainant and the accused immediately prior to acceptance of the bribe or gratification, and when the evidence of the Trapping Officer is also found weak piece of evidence qua the recovery of muddamal currency notes, the use of anthracene powder in laying down the ACB trap and the evidence of scientific nature led by prosecution, would not help prosecution and, therefore, the tendency to use the anthracene powder is being deprecated by the Courts. When the Court is asked to place reliance on the bare words of the Trapping Officer or any witness, as to the presence of anthracene powder marks, the Court should evaluate the evidence as to the tests carried out. The Trapping Officer Shri Vyas

was a partisan witness. Shri Vyas, Trapping Officer, has not stated anything about his expertise as to the use of anthracene powder or has narrated anything about his past experience as to the use of anthracene powder. Therefore, the version of Shri Vyas that he had seen the anthracene powder marks on the hands and clothes of the appellant would need independent corroboration. In the case of ***Ambalal Motibhai Patel v. State, reported in 1960(1) GLR 113***, the Division Bench of this Court has inter alia held as under :

> ***"Head Note*** *: That the two tests required to be satisfied by the prosecution to prove the presence of anthracene powder are, (1) that no powder was detected with the naked eye and (2) that when ultra violet light was focused there was emission of light blue flourescent light.*
>
> *That in the case of an interested witness, the courts must always weigh the evidence with particular caution, and if after*

scrutinising the evidence of an interested witness, the Court finds it safe to accept such evidence, then independent corroboration is not necessary.

That the evidence of a partisan witness, which is unsatisfactory, cannot be relied upon for implicating an accused person without independent corroboration."

45. In the same way, in the case of ***Ramsing Bhadrasing v. State, reported in 1980(1) GLR 138***, the Division Bench of this Court has inter alia observed as under :

"....When the prosecution wants to prove the presence of anthracene powder on the hand of the appellant, it is the duty of the prosecution to prove by means of expert evidence or books of science of the nature of anthracene powder, the manner in which its presence can be detected and the tests to be applied and the results are

positive, the positive results lead to one and only one conclusion, namely the finding of anthracene powder. It is for the prosecution to prove that positive results are a conclusive proof of the find of anthracene powder. This is a matter on which experts should give evidence. The prosecution can also rely on books of science. In this case, the prosecution has not led any evidence of this type as to the nature of anthracene powder and the means of detecting presence of anthracene powder... ...

xxx xxx xxx

... The prosecution must lead positive evidence by way of expert evidence or books of science to prove the sure methods of detection of anthracene powder, the nature of the test to be applied, the nature of the result to be expected and whether a layman can detect anthracene powder when such a test is applied. The prosecution must also prove that if the test leads to a positive result, it conclusively proves

the presence of anthracene powder and nothing else....”

46. In the present case, neither the panch nor the complainant has supported the case of the prosecution; and the evidence of Police Inspector Shri Vyas, as discussed in the foregoing paragraphs,is found weak and it is not an evidence of a fair and transparent Trapping Officer. The ultraviolet lamp operator has not been examined who could have corroborated the evidence of Police Inspector Shri Vyas as to the presence of anthracene powder marks on the hands and clothes of the appellant. So as this case has become a case of, at the most, alleged recovery of muddamal currency notes, it would be risky for this Court to link the appellant with crime in such or similar cases. The accused of such or similar cases deserves to be given benefit of doubt. Of course, if the concerned Government Department intends to proceed for the fishy conduct of the appellant on the day of trap, it can proceed against the appellant because the standard of proof required in departmental

proceedings is not that strict like in criminal trial.

47. In view of aforesaid reasons, observations and discussion, the present appeal is hereby allowed. The judgment and order of conviction and sentence dated 30th December 1991, passed by the learned Special Judge, Ahmedabad, in Special Case No.25 of 1989, is hereby set aside. The appellant-orig.accused is hereby ordered to be acquitted from all the charges levelled against him in respect of the offence in question by giving him benefit of doubt. The amount of fine, if any paid, be refunded to the appellant-orig.accused on proper identification.

(C.K. Buch, J)

Aakar